UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OLEN MIDKIFF, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**No. 4:08CV1219-DJS**
	)	
3M COMPANY, et al.,	)	
	)	
Defendants.	)	

ORDER

Now before the Court is defendant Mine Safety Appliances Company's ("MSA") motion for summary judgment [Doc. #75]. This matter has been fully briefed and is ripe for disposition.

Background

Plaintiffs Olen and Linda Midkiff filed this products-liability action on August 21, 2008, seeking to recover damages for personal injuries caused by plaintiff Olen Midkiff's exposure to silica dust during his employment at ISP Minerals, Inc. Plaintiffs allege that, from the late 1960s until the early 1980s, Mr. Midkiff used a respirator designed and manufactured by MSA and that the respirator was defective, causing Mr. Midkiff to develop silicosis after inhaling silica dust. Plaintiffs' complaint against MSA consists of four counts, alleging strict products liability, breach of warranty, negligence, and loss of consortium. After a period of discovery, MSA filed the instant motion for summary judgment on the grounds that plaintiffs' claims are barred by the applicable statute of limitations.

Standard of Review

In considering a motion for summary judgment, the Court will "view all of the evidence in the light most favorable to the nonmoving party and [will] give that party the benefit of all reasonable inferences to be drawn from the facts disclosed in the pleadings." Reich v. ConAgra, Inc., 987 F.2d 1357, 1359 (8th Cir. 1993). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." Mansker v. TMG Life Ins. Co., 54 F.3d 1322, 1326 (8th Cir. 1995).

Facts

The following facts are undisputed for purposes of the instant motion. From October 19, 1966, to September 10, 2003, Mr. Midkiff was exposed to silica dust in the course of his employment at ISP. Mr. Midkiff understood from the very beginning that the dust was harmful, and by December 2000, he was familiar with silicosis as a harmful lung disease.

ISP employees were given annual health examinations beginning in the early 1970s, and as part of these examinations, employees had chest x-rays taken. Each year, Mr. Midkiff read the reports provided by ISP regarding his annual health exams. Mr.

Midkiff's chest x-rays were reported as outside established limits in 1981, 1983, 1984, 1985, 1986, and 1987. His chest x-rays showed abnormalities in 1992, 1993, 1994, 1995, 1998, 1999, and 2000. In November 2002, Dr. Hugh Mullin examined Mr. Midkiff's chest x-ray and noted his impression that abnormalities in his lungs were "consistent with either silicosis [ ] or tuberculosis." Doc. 76-4, p. 35. Because of his lung abnormalities, ISP sent Mr. Midkiff to see in 2001 and 2003, Dr. Mark Briete and Dr. Joseph Ojile, respectively. The records from Mr. Midkiff's visit with Dr. Briete were destroyed.

As of March 27, 2003, Mr. Midkiff knew that he had an abnormal x-ray history, silica exposure, and that he was being evaluated for a potentially serious health condition. On the health history form Mr. Midkiff filled out and signed at his March 27, 2003, visit to Dr. Ojile, he noted that the reason for his visit was "lung problems, shortness of breath." At that first visit, Dr. Ojile took a history, performed a physical examination, and had a CT scan and pulmonary function tests performed on Mr. Midkiff. At that time, Dr. Ojile was aware of Mr. Midkiff's past abnormal x-ray, and an occupational lung disease was suspected. Upon reviewing the CT scan, Dr. Ojile wrote that it showed "findings consistent with the clinical history of silica exposure," although Dr. Ojile noted that sarcoid, an non-occupational lung disease, can give a similar appearance. On March 27, 2003, Dr. Ojile gave Mr. Midkiff a possible diagnosis of silicosis, but he did not rule out other diseases such as chronic obstructive lung disease. Around that time, Mr. and Mrs. Midkiff were aware that ISP and Dr. Ojile were considering the possibility that Mr. Midkiff had silicosis, so they started researching the disease.

Mr. Midkiff next visited Dr. Ojile on May 22, 2003. Dr. Ojile reviewed the results of the CT scan and pulmonary function tests performed on March 27, 2003. In the "Impression" section of his notes for the visit, Dr. Ojile wrote "silicosis." Dr. Ojile explained in his deposition that, while he discussed the possibility with Mr. Midkiff that he had silicosis, he did not make a final diagnosis that day because he was still waiting on old medical records to review.

One day after Mr. Midkiff's second visit with Dr. Ojile, May 23, 2003, Mr. Midkiff visited his family doctor, Dr. David Gayle. In the diagnosis section of his notes, Dr. Gayle wrote silicosis, pulmonary fibrosis, and possible coronary artery disease, which he described as a provisional diagnosis based on the chest x-ray he had looked at and Mr. Midkiff's indication that he was under evaluation for possible silicosis by Dr. Ojile. On June 23, 2003, Mr. Midkiff saw Dr. Gayle again, and Dr. Gayle's diagnosis was simply silicosis and did not include pulmonary fibrosis or coronary artery disease. Then, on August 6, 2003, Mr. Midkiff saw Dr. Gayle for a third time, and again Dr. Gayle's diagnosis was silicosis. Although Dr. Gayle wrote in his notes that Mr. Midkiff's diagnosis was silicosis, upon being deposed for this litigation, he denies diagnosing Mr. Midkiff with silicosis and the ability to do so based on his lack of specialized training. He insists he relied upon what Mr. Midkiff had told him in writing silicosis as his diagnosis.

On August 25, 2003, Dr. Ojile wrote a letter to ISP's company doctor regarding Mr. Midkiff's condition. Dr. Ojile wrote that his impression was that Mr. Midkiff had silicosis and should not be exposed to any further silica. Dr. Ojile's letter to ISP's doctor indicated that he discussed Mr. Midkiff's silicosis diagnosis with him on May 22, 2003. Dr. Ojile indicated that he waited until August to write the letter because that was when he got around to it and because that was when he had enough data to make him comfortable to make his diagnosis official. Dr. Ojile was aware that once he notified Mr. Midkiff's employer of the silicosis diagnosis, Mr. Midkiff would no longer be permitted to work there. Mr. Midkiff testified that he first learned that he had silicosis on September 10, 2003, when the safety director of ISP informed him that he was suffering from the disease.

Discussion

In its instant motion, defendant moves the Court for summary judgment, arguing that plaintiffs' claims are barred by the applicable statute of limitations. Defendant specifically argues that Mr. Midkiff's silicosis was sustained and capable of ascertainment more than five years before he filed his complaint on

August 21, 2008. Plaintiffs oppose defendant's motion, arguing that Mr. Midkiff could not have known of his silicosis more than five years before he filed his lawsuit because it was not officially diagnosed until August 25, 2003.

This case is before the Court under diversity jurisdiction. Federal courts sitting in diversity apply the substantive law of the forum state, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); Birnstill v. Home Sav. of Am., 907 F.2d 795, 797 (8th Cir. 1990), including the statute of limitations of the forum, Great Plains Trust Co. v. Union Pac. R.R. Co., 492 F.3d 986, 992 (8th Cir. 2007). The parties apply Missouri law and the Missouri statute of limitations in their briefs, and neither argues for the application of a different state's law. Accordingly, the Court will apply the law and statute of limitations of Missouri, the forum state of this Court.

Missouri's statute of limitations for personal injury claims, such as plaintiffs' product-liability suit, is five years. Mo. Rev. Stat. § 516.120(4). A cause of action for personal injuries accrues "when the damage resulting therefrom is sustained and capable of ascertainment." Mo. Rev. Stat. § 516.100. Whether damages were sustained and capable of ascertainment at a given time is an objective standard and is a question of law. H.R.B. v. Rigali, 18 S.W.3d 440, 443 (Mo. Ct. App. 2000). "Only where there could be some contradictory or different conclusion drawn from the evidence will a statute of limitations question be submitted to the jury to decide." Id. Accordingly, the resolution of the instant motion depends on when Mr. Midkiff's injury was sustained and capable of ascertainment.

The Missouri Supreme Court has held that damages are sustained and are capable of ascertainment as an objective matter "when the 'evidence [of damages] was such to place a reasonably prudent person on notice of a potentially actionable injury.'" Powel v. Chaminade Coll. Preparatory, 197 S.W.3d 576, 582 (Mo. 2006) (quoting Bus. Men's Assurance Co. of Am. v. Graham, 984 S.W.2d 501, 507 (Mo. 1999) (en banc)). "Damages are ascertained when the fact of damage appears rather than when the extent or amount of damage occurs." Grady v. Amrep, Inc., 139 S.W.3d 585, 588 (Mo. Ct. App. 2004). "[T]he capable of ascertainment test is to determine when a plaintiff could have first maintained the action to a successful suit." Rigali, 18 S.W.3d at 443. "Mere ignorance of the plaintiff of his cause of action will not prevent the running of the statute of limitations." Id. While a personal injury involving an illness, such as silicosis, is certainly capable of ascertainment when it has been diagnosed, the date of diagnosis is not dispositive if the circumstances of the illness were such that a reasonably prudent person would be aware of a potentially actionable injury prior to the date of diagnosis. See Midkiff v. 3M Company, No. 4:08-CV-1221-RWS, 2010 WL 1687123, at *3 (E.D. Mo. Apr. 26, 2010) (providing survey of Missouri cases involving the application of the statute of limitations to diagnosable illnesses).

In support of its motion, defendant highlights that Mr. Midkiff began working in his occupation in 1966, and he understood from the beginning that the dust he was exposed to was harmful. In fact, he was required to wear a respirator to filter the air he breathed, including defendant's respirator for many years. The hazard was also such that, beginning in the early 1970s, his company required yearly health examinations that focused on the health of Mr. Midkiff's lungs. Mr. Midkiff's lungs first displayed characteristics outside of established limits in 1981 and continued to show abnormalities through 2000. Mr. Midkiff was sent to a pulmonologist by his company because of his abnormal lung x-rays in 2001 and 2003. In November 2002, a physician indicated that Mr. Midkiff had either silicosis or tuberculosis. In March 2003, Mr. Midkiff told his doctor he had lung problems and shortness of breath. His doctor ordered tests, noted that the findings were consistent with a history of silica exposure, and concluded that silicosis was a possible diagnosis. At that time, plaintiffs began doing research on silicosis. In May 2003, Dr. Ojile gave Mr. Midkiff a provisional diagnosis of silicosis but had not yet ruled out other illnesses. Dr. Gayle noted Mr. Midkiff's diagnosis as silicosis in June and early August of 2003, based on Mr. Midkiff's statements to him.

In this case, however, conflicting evidence exists regarding whether a reasonable person would have been aware of a potentially actionable injury prior to August 21, 2003. Dr. Ojile testified that he did not tell Mr. Midkiff that he had silicosis at either of his appointments and that other, non-occupational, illnesses were still under consideration. Dr. Gayle testified that he was not qualified to diagnose silicosis, did not diagnose Mr. Midkiff with silicosis, and only mentioned silicosis in Mr. Midkiff's medical records because Mr. Midkiff told him he was being evaluated by Dr. Ojile for silicosis. Unlike the plaintiffs in the companion cases cited by defendant, Midkiff v. 3M Company, No. 4:08-CV-1221-RWS, 2010 WL 1687123 (E.D. Mo. Apr. 26, 2010), and Savage v. 3M Company, No. 4:08-CV-1162-CAS, 2010 WL 4000620 (E.D. Mo. Oct. 12, 2010), it is not clear on this summary judgment record whether Mr. Midkiff was given a definitive silicosis diagnosis by any doctor more than five years before filing his lawsuit. Instead, Mr. Midkiff's medical records have been explained by his doctors such that a reasonable person may not have known of an actionable injury until the non-occupational illnesses were ruled out. The Court cannot resolve this conflicting evidence upon a motion for summary judgment.

Given the summary judgment standard, which requires the Court to make all reasonable inferences in favor of plaintiffs, the Court finds that defendant has not demonstrated a right to judgment as a matter of law on this record.

Conclusion

Upon the undisputed facts presented, defendant has not established a right to judgment as a matter of law. Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment [Doc. #75] is denied.

Dated this 27th day of December, 2010.

/s/Donald J. Stohr
UNITED STATES DISTRICT JUDGE